No. 208.

Reply Brief of Orig. for Petitioner

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OCTOBER TERM 1900

NO. 503

FREDERICK WILLIAMS,

Petitioner

against

GEORGE C. GAYLORD, CHARLES E. MADDRILL and DWIGHT T. ROLFE

Respondents

BRIEF IN REPLY TO ARGUMENT OF RESPONDENTS.

C. WALTER ARTZ,
For Petitioner

Supreme Court of the United States.

OCTOBER TERM 1900

No. 503.

FREDERICK WILLIAMS,
Petitioner,

AGAINST

GEORGE C. GAYLORD, CHARLES E. MADDRILL AND DWIGHT T. ROLFE,
Respondents.

BRIEF IN REPLY TO ARGUMENT OF RESPONDENTS.

Under leave of Court the petitioner desires to submit the following suggestions of law in reply to the argument of the respondents, filed herein:

I.

The distinction between cases in the State courts (a) construing the actual terms of statutes, (b) which can by no possibility have effect beyond the borders of the State and (c) which like the case at bar lack both of these elements is apparent in the cases cited by the respondents.

In the first and second classes of cases the established decisions of the State courts will be in

general followed by the Federal courts in suits in equity although the provisions of the 34th section of the Judiciary Act are only applicable to actions and proceedings at law.

It is but reasonable that the statutes of the various states should be construed by the local courts and that this construction should be adopted by the Federal tribunals.

It is equally reasonable that local rules of property based upon the common law of the several States as enounced by their respective courts duly constituted and established should be respected to the same extent by the Federal courts sitting in the various local jurisdictions.

When, however, the State decisions are not constructive of a State statute nor enunciatory of a *well settled* local rule of property, they are as clearly possessed of no such authority, but can only be used in the Federal courts by the reasoning contained in them to shed light upon a similar situation, and are of no greater weight than similar decisions of another State court of co-ordinate rank.

In our main brief we have presented the facts in the instant suit, upon which we submit that no other conclusion can be reached than that the California decisions relied upon below have no application as controlling authority.

The respondents' counsel have, however, cited and quoted from numerous cases in this Court, in their argument against the petitioner's position.

Many of the quotations the Court will notice are statements of the general principles which have for many years furnished rules of decision in this Court where the construction of the State statutes or rules of property *clearly local* have been involved, and are therefore not decisive here.

They will be found to be:

(a) Cases where the fact is stated that the construction of a State statute purely local in effect is the basis of the decision among which may be cited.

Christy v. Pridgeon 4 Wall 196.
German Bank v. Franklin Bank 128 U. S. 526.
Cross v. Allen 141 U. S. 528.
Forsythe v. Hammond 166 U. S. 506.
Louisiana v. Pillsbury 105 U. S. 278.
Merchants Bank v. Penna. 167 U. S. 461.

(b) Cases relating to the form and subsequent legal effect of an instrument *as such*, and whether it complies with the recording acts, under the law of the local jurisdiction; as:

Randolph v. Quidnick Co. 135 U. S. 457.
Ober v. Gallagher 93 U. S. 199.
Townsend v. Todd 91 U. S. 452.
Etheridge v. Sperry 139 U. S. 276.

(c) Cases where the local law governing the transmission of estates and the tenure of real estate is involved.

See U. S. v. Fox 94 U. S. 315.

(d) Cases where a remedy of a purely local nature is provided by the common law of the State as declared by its courts.

Bucher v. Cheshire R. R. Co. 125 U. S. 555.

Shelby v. Guy 11 Wheat 361.

Detroit & Osborne, 135 U. S. 492.

This Court is careful always to note in statutory construction cases that the statute is the direct basis of the decision, or that the rule of property is of purely local application.

The fact that a statute may be material to the historical development of the case in hand but its construction was not the actual point decided by the State court, at once removes the case from the catagory just mentioned and the Federal Courts act upon their own reasoning.

In Olcott v. Supervisors 16 Wall 678 a railroad was constructed and maintained under a statute of Wisconsin.

Said STRONG J.: (p. 688)

"Whether the act of Assembly of the State of Wisconsin, approved April 10th, 1867, under which the county orders or promissory notes sued upon, in this case, were issued was a lawful exercise of constitutional power, is the only question in the case. . . . . .

(p. 689) At the outset we are met by the fact that the Supreme Court of the State has decided the act was unauthorized by the Constitution. It was thus ruled in *Whiting v. Fond du Lac* (25 Wis. 188). If that decision is binding upon the Federal courts, it it has established a rule which we are under obligations to follow, the matter is settled.

It is undoubtedly true in general that this court

does follow the decisions of the highest courts of the States respecting *local questions peculiar to themselves*, or respecting the construction of their own constitution and laws. *But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgments.* That *Whiting v. Fond du Lac County* was not a determination of any question of local laws was manifest. It is not claimed to have been that. *But it is relied upon as having given a construction to the Constitution of the State. Very plainly, however, such was not its character or effect.* The question considered by the court was not one of interpretation or construction. *The meaning of no provision of the State Constitution was considered as declared.* What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation is a matter of public concern. It was asserted (what nobody doubts), that the taxing of a State extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid. For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The

nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

The case of Sawyer v. Oakman (1 Lowell 134) cited and quoted at page 17 of our main brief also shows very clearly the difference between the construction of a statute and the application of a general principle of law arising thereon.

This court in the case of B. & O. R. R. v. Baugh, 149 U. S. 368, (at 372 to 375) after reiterating the rule laid down in Burgess v. Seligman, (107 U. S., 33 to 34) to the effect, among other things, that established rules enounced by the State courts in their decision particularly with respect to the law of real estate and the construction of State statutes, will be followed by the Federal courts, but that inasmuch as the very object of giving the National courts jurisdiction was to institute independent tribunals without prejudices or sectional views, it would be a dereliction of duty not to exercise an independent judgment in case not actually foreclosed, refers to several cases, among them, Bucher v. Cheshire R. R. Co., 125 U. S. 555, Detroit v. Osborne, 135 U. S. 492, Claiborne County v. Brooks, 111 U. S. 400, to show that where the local law as determined by decision, is respected as authoritative by this court, it must appear clearly that the matters under consideration are purely local, that the point decided is of essential local application and can by no stretch of legal reason be ex-

tended beyond the borders of the State in such a way as general law is respected abroad.

In Boyce v. Montauk Co. 37 W. Va. 73, the Supreme Court of Appeals applied the New York statute to the case of a foreclosure by a New York corporation of land in West Virginia but applied general law to determine whether the corporation was estopped to raise the question of non-compliance with that statute.

The court will notice finally that there is no decision showing that the ruling in the Pekin case has ever been since applied by the California court to foreign corporations.

II.

The Respondents' Argument fails to distinguish between acts void in toto and incapable of ratification and those which are voidable only.

Counsel appear to lay much stress upon the conclusion drawn by the Supreme court of California in the case of McShane v. Carter (80 Cal. 310) that as the directors had by construction placed upon the statute, in power to convey in the absence of the consent of two thirds of the stock, the title did not pass (Respondents' Argument p. 28); in other words that the instrument was in counsel's words "void."

It seems reasonable that a decision holding an instrument void even if it be admitted to result from the construction placed upon a statute, is of no greater effect than the language of the statute in case it expressly declared such an instrument void.

And if this is so we think that counsel failed to note the applicability of the decision of this court in St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 393 (402, 403) cited and quoted in our main brief (p13) where the words "null and void" used in a similar statute in force in Illinois were construed to mean "voidable," *because the statute was in its spirit* ALTHOUGH NOT SO SPECIFIED IN ITS TITLE "*for the protection*" *of stockholders* and not so inherently beyond the powers of the corporation or against the interest of the public as to be void. To construe the Illinois statute otherwise would have been observed under the general rules of corporation law, and a State decision so plainly objectionable on that ground can scarcely be of value in this court.

The inapplicability of cases becomes manifest where the instrument in question is absolutely void as against public morals or affecting public rights, e. g. as against Sunday Laws (Reeves v. Butcher 31 N. J. Law 224; Respondent's Argument pp. 29-30) or beyond the power of a municipal division of the State (German Bank v. Franklin Co., 128 U. S. 526; Respondents' Argument p. 30) or where a corporation having failed to perform certain acts necessary *to be performed within the State* as prerequisite to the conduct of its business therein, seeks to avail of a contract made in the conduct of such business (Cincinnati &c. Co. v. Rosenfeld 55 Ill. 85; Miller v. Ammon 145 U. S. 421) or where the instrument is one which "the corporation had no right to create" i. e. void *per se* (Davis v. Bank 4 McLean 387; Root v Wallace 4 McLean 8; Root v. Goddard 3 McLean 102) or where the corporation seeks to recover under a

continuing or *executory* contract which it "had no power to make" (Penna. R. R. Co. v. St. Louis &c. R. R. Co. 118 U. S. 290; Central Transportation Co. v. Pullman's &c. Co. 139 U. S. 24) or where in the case of National Banks the question presented is "not one of irregularity of organization, or of abuse of a legal power but of an attempt to exercise a power *expressly prohibited by statute*" (McCormick v. Market Bank 165 U. S. 538, 553) or where under established law that National Banks "cannot rightfully exercise any powers except those expressly granted" a purchase by one bank of the stock of another "was entirely outside of the powers conferred upon the bank" and a stockholder was not estopped to raise the question (California Bank v. Kennedy 167 U. S. 362, 366, 370).

Many other instances may be presented where the contracts under consideration are immoral, against public policy or otherwise void *per se* as negotiable paper void *ab initio* and particularly where they are executory in whole or partly or "disable the corporation from performing its obligations to the government and to the public" (SANBORN, J. for the Circuit Court of Appeals for the eighth circuit in Sioux City &c. Co. v. Trust Co. 82 Fed. 124 at 134 distinguishing Thomas v. R. R. Co. 101 U. S. 71; Penna R. R. v. St. Louis &c. R. R. 118 U. S. 290; Oregon &c. Co. v. Oregonian &c. Co. 130 U. S. 1; and Central Trans. Co. v. Pullman's &c. Co. 139 U. S. 24 from one like the instant case).

III.

The Constitutional Provision (Const. Cal. Art.

XII Sec. 15) relating to the transaction of business by foreign Corporations is not material to this case.

We submit that the attempt to help out the Statute of 1880 (p. 131) by the constitutional provision cited must fail.

The Mining Company purchased of Shoecraft, a resident of New York (Certificate of Incorporation: Record p. 199) the mine in question and he caused a deed to be given by the Citizens Bank, a California corporation (Deed; Record p. 218).

Part of the consideration to be paid under the resolution (Record p. 136) was $25,000 out of a total proposed issue of $50,000 of first mortgage bonds. One half of the issue therefore stood as purchase money and the mortgage was as to those bonds a purchase money mortgage with all the equities thereto belonging.

The mortgage was made to a New York trustee and the bonds were made payable in New York City. (Record pp. 14, 23.) The deed was recorded of course by the Mining Company and the mortgage by the trustee. The record having been effected in California the question arises whether the Mining Company transacted business there within the meaning of the constitutional provision.

Counsel for the respondents contend that such was the case.

This point was considered in the case of Cooper Manufacturing Company v. Ferguson, 113 U. S. 727,

where a statute of Colorado provides, "sec. 23. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business was carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served: and such corporations shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

This court by defining what was meant by the carrying on of business said (Mr. Justice WOOD) at p. 734.

"Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution required the foreign corporation to have one or more known places of business in the State before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the State. To have known places of business it must be carrying on or intending to carry on business. The statute passed to carry the provision of the Constitution into effect, makes this plain, for the certificate which it requires

to be filed by a foreign corporation must designate the principal place in the State where the business of he corporation is to be carried on. The meaning of the phrase 'to carry on' when applied to business is well settled. In Worcester's Dictionary the definition is: 'To continue, as to carry on a design: to manage or prosecute, as to carry on husbandry or trade.' The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado.

The obvious construction, therefore, of the Constitution and the statute is, that no foreign corporation shall begin any business in the State, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the State, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business in the State, would be unreasonable and incongruous."

While it appears in that case that the corporation had no purpose of doing any other acts of business in the State of Colorado, it is we submit, equally apparent that under no circumstances could the filing of a paper or other act not in reality the prosecution of business in the ordinary sense of that term, be considered as affected by the statute.

It is to be noticed that the statute in the case mentioned which is in substantially the form usually adopted by the various States, provides that a certain act, namely the filing of the paper in the office of the Recorder or such other place as may be prescribed, shall take place "*before*" such corporations "are authorized or permitted to do *any* business

in this State." Under such a ruling it seems to us obvious that the filing of the deed conveying the property to the company, which was the only act performed within the State of California in the case at bar, cannot in any respect be considered as the doing of business in that State. The mortgage was not to be authorized in the State nor was the action taken to that end in fact performed there, nor was the mortgage executed there. We submit therefore that the constitutional provision of the State of California with respect to foreign corporations quoted above and relied upon by the respondents' counsel, is of no application here, the acts in this case being in no sense the prosecution of business within the State of California.

See also Fritts v. Palmer 132 U. S. 282 distinguishing between the purchase of real estate and the transaction of business; and Gilchrist v. Helena &c. Co. 47 Fed. 593.

Moreover it does not appear that this constitutional provision was at all considered in the case of Pekin Mining Company v. Kennedy, (81 Cal. 356) but the report shows that no reference whatever was made to it and that the decision of the court is in fact merely a decision on the general point that judgment creditors of any corporation which may come before that court whether foreign or domestic, may question acts in excess of the powers of the Directors of the corporation but not themselves, *ultra vires.*

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